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The Department of Agriculture's Regulation of Poultry  
Under the Poultry Products Inspection Act of 1957

Professor Peter Barton Hutt

Charles Coble

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One of the most consistent sources of confusion and misunderstanding within the realm of government regulation of foods has been the location of the line separating that which the United States Department of Agriculture (USDA) regulates from that which lies under the purview of the Food and Drug Administration (FDA). The area in question is that of meat regulation. Beginning as early as 1884, various statutory enactments, followed in due course by amendment and superseding legislation, have placed the basic authority for monitoring the wholesomeness of red meat and poultry at the time of slaughter and processing with USDA. These laws coexist with the Federal Food, Drug and Cosmetic Act of 1938 (FDCA), however, which grants the FDA general authority to insure that wholesome, unadulterated, and properly labeled food reaches the American consuming public. Given the ever-growing role of processing in the production of food, distinction between red meat and poultry products and all other food products has become problematic. The regulations which chart this nether region are marked more by their obscurity than their clarity or consistency. None of this would pose any difficulty were it not for the fact that FDA and USDA often regulate in radically different fashions. The net result has been wide-ranging duplication of effort and inefficiency and nothing short of bewilderment on the part of consumers and industry. It is unfortunate that such qualities are associated with agencies to which are conferred the vital mission of protecting the public health of our country.

As a matter of introduction, a few examples will illustrate the over-

lap in authority between FDA and USDA, as well as the fine distinctions on which placement of regulatory authority often turn. Imagine a large soup manufacturer, which produces in one plant both vegetable soup and chicken noodle soup. The vegetable soup would fall under the authority of FDA. USDA would regulate the chicken noodle soup, however, provided that it did not contain “less than 2 percent cooked poultry meat (deboned white or dark poultry meat, or both) and/or ‘Mechanically Separated (Kind of Poultry)’.”<sup>1</sup> As will be discussed later, FDA would inspect the plant sporadically, while the processing of the chicken noodle soup could only be proceed in the presence of a USDA Food Safety Inspection Service (FSIS) inspector. This is all despite the fact that the potential health hazards of the two soups are nearly identical. The same duplication will occur in the plant of a frozen dinner manufacturer which produces both frozen chicken (USDA regulated) and frozen fish (FDA regulated) dinners.<sup>2</sup> Regarding the government’s “schizophrenic sandwich policy,” Judy Quick, chief of USDA’s standard’s branch, admitted “It doesn’t make any sense, I’ll warn you.”<sup>3</sup>

In addition to USDA/FDA overlap within individual processing plants, certain processed food items will move back and forth between USDA and FDA authority as they progress down the chain of production.<sup>4</sup> For example, FDA

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<sup>1</sup>9 C.F.R. §381.15

<sup>2</sup>See “Food Regulation: A Case Study of USDA and FDA,” in *Study on Federal Regulation: Regulatory Organization*, Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess., Vol. V, Ch. 4, p. 113, 120 (Comm. Print 1977).

<sup>3</sup>Carole Sugarman, “Who’s Minding the Store?: The Seemingly Senseless Division of Federal Labeling Authority,” *Washington Post*, May 11, 1988; FDA regulates sandwiches made with two distinct pieces of bread. On the other hand, the USDA regulates “nontraditional sandwiches that are either enclosed..., open-faced or partially opened.”

<sup>4</sup>This example taken from “A Case Study of USDA and FDA,” note 2, at 117.

holds authority over live animals which eventually will be eaten.<sup>5</sup> USDA assumes jurisdiction once these animals reach the slaughterhouse, where FSIS personnel conduct ante-mortem and post-mortem inspections. The USDA continues to exercise authority over the meat and all added ingredients, meat or non-meat, while the meat is in the processing facility. FDA and USDA share jurisdiction of the processed food upon its departure from the processing plant. Although both agencies have jurisdiction over sale of adulterated or misbranded meat products in retail establishments, only FDA is authorized to inspect such establishments.

The purpose of this paper is to investigate the reasons why such obstacles to effective public health policy exist in the United States. I will begin my investigation by briefly outlining the earlier chronology of meat regulation in the United States. When I reach the period of time in which poultry inspection became mandatory, I will engage in a more in depth historical analysis of the reasons why the system which prevails today developed as it did. This portion of the paper is based largely upon Congressional hearings, reports, and floor debate. I will then conclude by noting proposals for reform and offer my own assessment of division of food regulation between USDA and FDA.

One cannot embark on an analysis of this troubling area without first carefully setting out its contours. Congress created the Bureau of Animal Industry within USDA in 1884.<sup>6</sup> This Bureau was charged with investigating the condition, protection, and use of, as well as the presence of disease in domestic

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<sup>5</sup>21 U.S.C. §392(b)

<sup>6</sup>23 Stat. 31 (1884)

animals. Such information was seen as “valuable to the agricultural and commercial interests of the county.”<sup>7</sup> The creation of this Bureau, distinct from USDA’s Division of Chemistry, which would exercise control over imported and exported meat beginning in 1890, opened a gulf within the field of food regulation which has never been bridged.<sup>8</sup>

The public outcry in response to Upton Sinclair’s vivid portrayal in *The Jungle* of the horrors of the red meat industry in Chicago motivated Congress in 1906 to enact federal legislation which would regulate food purity.<sup>9</sup> The Meat Inspection Act of 1906 formed part of an appropriations measure, and it covered only the red meats (pork, beef, lamb, and other non-poultry sources of meat, not including seafood). In 1907 the Federal Meat Inspection Act (FMIA)<sup>10</sup> was enacted as independent legislative act, but was identical in substance to the 1906 measure. USDA’s Bureau of Animal Industries administered the FMIA, which mandated strict carcass-by-carcass inspection. Also in 1906 Congress enacted the Pure Food and Drug Act (PFDA).<sup>11</sup> It applied to applied to all non-meat foods and was administered by USDA’s Bureau of Chemistry. Thus from the outset of food regulation in the United States, red meat was regulated by one branch of USDA, while jurisdiction of all other foods fell under the control of a different branch.

In 1927 Congress reorganized USDA and separated the research and

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<sup>7</sup>*Id.*

<sup>8</sup>Peter Barton Hutt and Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 39 Food Drug Cosmetic Law Journal 2, 53 (1984)

<sup>9</sup>*Id.*, at 53-54

<sup>10</sup>21 U.S.C. §§601 *et seq.*

<sup>11</sup>34 Stat. 768 (1906), as amended

regulatory functions of Bureau of Chemistry. The regulatory authority, which enforced the PFDA now fell under the Food, Drug, and Insecticide Administration, still within USDA. In 1931 Congress renamed the Food, Drug, and Insecticide Administration the Food and Drug Administration.

As time passed and food processing become both more prevalent and more sophisticated, the PFDA came increasingly to be seen as inadequate. For example, there existed no legal standards for foods, FDA lacked the ability to inspect warehouses, and many dangerous additives lay beyond the scope of FDA's regulatory authority.<sup>12</sup> Conspicuously absent as well were provisions which would enable FDA to police false and misleading claims made about food.<sup>13</sup> Five years after the bill was first introduced in 1933, Congress enacted the Food, Drug and Cosmetic Act,<sup>14</sup> which accomplished a significant modernization and strengthening of the PFDA.<sup>15</sup> As before, jurisdiction to enforce the wholesomeness and labeling of foods lay in the hands of FDA. In 1940 Congress removed FDA from USDA and placed it in the newly created Federal Security Agency. In 1953 FDA was moved again, this time being placed in the new Department of Health, Education, and Welfare, which was renamed the Department of Health and Human Services in 1979.

Despite the fact that FDA was relocated to what was perceived as a more consumer-conscious agency in 1940, USDA retained its long-standing responsibility for meat inspection and other aspects of meat regulation. Thus in

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<sup>12</sup>Peter Barton Hutt and Richard A. Merrill, *Food and Drug Law* (2d. Ed. 1991), 11

<sup>13</sup>*Id.*

<sup>14</sup>21 U.S.C. §§301 *et seq.*

<sup>15</sup>*Id.*, at 11-12

1940 for the first time red meat was regulated by personnel of an agency completely distinct from that which policed the remainder of the American food supply. As a result of the division an incongruity developed which was becoming ever-the-more obvious by the 1950's, namely that red meat was subjected to the highest scrutiny while the poultry industry enjoyed relatively little government intrusion. Jurisdiction over poultry at that time remained with FDA under the FDCA; budgetary and personnel constraints dictated that FDA inspectors visit a given plant only once every three or four years.<sup>16</sup> This fact is quite shocking when compared with the rules governing red meat under the FMIA, which directed that each carcass be inspected and that no processing take place absent the supervision of a USDA inspector. Meanwhile the poultry industry, owing largely to the advent and widespread use of refrigeration, was growing by leaps and bounds.

Such growth was not without its attendant problems; some estimated in the mid-1950's that the culprit responsible for fully one-third of all food poisoning-related illness was poultry.<sup>17</sup> Shirley Barker, Director of the Poultry Department of the Amalgamated Meat Cutters and Butcher Workmen of North America (AFL-CIO), noted in his statement that twenty-six different diseases were transferable from poultry to humans.<sup>18</sup> These diseases threatened not just

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<sup>16</sup>Letter of Charles Crawford, Commissioner of the FDA to Leonar Sullivan, Representative from Missouri, *Hearing before the Subcommittee on Poultry and Eggs of the Committee on Agriculture, House of Representatives, 84th Congress, 2d Session, on Compulsory Poultry Inspection*, July 17, 1956, p. 8

<sup>17</sup>Statement by Senator Murray, *Hearing before the Subcommittee on Legislation Affecting the Food and Drug Administration of the Committee on Labor and Public Welfare, United States Senate, 84th Congress, 2d Session, on S. 3176*, May 9, 1956, p. 1

<sup>18</sup>*Id.*, at 102. These diseases are: Bacterial (Erysipelas, Listeriosis, Tuberculosis, Tularemia, Staphylococcosis), Streptococcosis, Salmonellosis, Diptheria, Brucellosis, Paracolon infections, Pseudotuberculosis, Fungal (Aspergillosis, Favus, Thrush, Sarcosporidiosis), Vi-



the consuming public, but also the workers employed by the poultry processing industry.<sup>19</sup> In addition that very year a psittacosis epidemic broke out in Oregon and two people perished.<sup>20</sup>

The health concerns posed by poultry were first addressed in 1928, when USDA began to offer a voluntary inspection and grading service to poultry processors who were willing to foot the bill. This program was structured along the lines of the mandatory program under the FMIA, but the service was carried out by a different division of USDA. Personnel in the Red Meat Division of the Agricultural Research Service (ARS) performed the inspections required by the FMIA, while personnel in the Poultry Division of the Agricultural Marketing Service (AMS) ran the voluntary inspections. The poultry program received official Congressional recognition in 1946 with the Agricultural Marketing Act,<sup>21</sup> which extended the program to fruits and vegetables. This program has three components: an inspection service, a grading service, and a sanitation monitoring service. Producers supported such a program because the “USDA approved” seals promised to augmented consumer confidence in poultry. Nevertheless, only between twenty and twenty-five percent of all poultry

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ral and viral-like (Eastern equine encephalomyelitis, Western equine encephalomyelitis, St. Louis encephalitis, Japanese B. encephalitis, Newcastle disease, Psittacosis, Rabies), Toxic (Tetanus, Botulism), Parasitic (Echinostomiasis, Schistosomiasis, Dermanyssus gallinae, Texeplasmosis).

<sup>19</sup>See generally *id.*, at 170 *et seq.* where the following studies are presented: *Poultry Sanitation Standards*, 41 American Journal of Public Health No. 8 (Aug. 1951); *Salmonellosis in Poultry and Poultry Processing Plants in Florida*, 16 American Journal of Veterinary Research No. 58 (Jan. 1955); *Diseases of Poultry Transmissible to Man*, 13 Iowa State College Veterinarian No. 2 (1951); *Poultry Inspection as Part of the Public Health Program*, 112 Journal of the American Veterinary Medical Association No. 850 (Jan. 1948); *Poultry Diseases as Public Health Problems*, from Public Health Reports, Federal Security Agency, Public Health Service, May 25, 1951.

<sup>20</sup>Statement of Victor Anfuso, Representative from New York, *Hearing on S. 3176*, note 17, at 59

<sup>21</sup>7 U.S.C. §§1621 *et seq.*

was inspected in this fashion.<sup>22</sup> Beyond this, FDA made occasional seizures under the FDCA of unwholesome, adulterated, or misbranded products injected into interstate commerce.

By the mid-1950's all agreed that these actions fell woefully short of the sort of vigilance necessary to insure that only safe poultry products entered the market. The following candid exchange took place between FDA Commissioner John Harvey and Senator Bender:

Senator Bender: "Do you think the present enforcement of the Food and Drug Act which includes poultry is adequate?"

Mr. Harvey: "No, sir."

Senator Bender: "You feel that there is a need for some additional steps being taken by Congress in order to protect the public in this matter?"

Mr. Harvey: "With regard to poultry, I do; yes, sir."<sup>23</sup>

With the success of the fifty-year-old mandatory inspection program of red meat obvious to everyone involved, a natural solution to the problems in the poultry industry would be creation of a parallel agency devoted to mandatory poultry inspection. Indeed, in over nine hundred pages of testimony in three separate Congressional hearings on the matter, not one witness voiced his or her objection to compulsory poultry inspection.<sup>24</sup>

Given the consensus that compulsory poultry inspection should be instituted, the point of dispute came to be over which agency would do the inspecting. FDA was regarded as a consumer protection agency above all else and

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<sup>22</sup>Statement by Hermon Miller, Director, Poultry Division, AMS, *Hearing on Compulsory Poultry Inspection*, note 16, at 92

<sup>23</sup>*Hearing on S. 3176*, note 17, at 18-19

<sup>24</sup>S. Rep. No. 129, 84th Cong., 2d Sess. (1956), p. 1; Statement of Mr. McIntire, *Congressional Record*, July 9, 1957, p. 11120.

had always enjoyed jurisdiction over poultry. USDA, while holding agricultural interests at heart, could boast fifty years of experience in dealing with a mandatory inspection program (the red meat program run by ARS) and twenty-eight years of experience in intensive poultry inspections (the voluntary service coordinated by AMS).

The first effort at instituting mandatory poultry inspection was made by Senator Murray with his bill, S. 3176, which he introduced in 1956. With this bill Murray proposed to amend the FDCA by appending to it a chapter dealing with poultry. Among other things, the new chapter would mandate bird-by-bird post mortem inspection, conducted by FDA. He justified his proposal as follows, “There appears to be some disagreement about where the poultry inspection work should be done. It is my own very strong belief that since protection of consumers is the fundamental objective of inspection, that work should go to the FDA in the Department of Health, Education, and Welfare.”<sup>25</sup> Murray found extensive support among public health and consumer-oriented officials for placing authority with FDA.<sup>26</sup> Murray’s supporters overwhelmingly pointed to the differing missions of USDA and FDA when justifying their opinion. One such witness stated, “I believe that by placing the responsibility of poultry inspection in the Federal FDA, the protection of the consumer’s health will be of primary concern, whereas consumer interests will be secondary if the responsi-

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<sup>25</sup> *Hearing on S. 3176*, note 17, at 1

<sup>26</sup> See e.g., Statement of Dr. Aaron Haskin, Health Officer, Dept. of Health, Newark, NJ, *id.*, at 213; Statement of representatives of the Conference of Public Health Veterinarians and the General Federation of Women’s Clubs, *id.*, at 216-217; Statement of Francis Wright, President of Housewives United, *id.*, at 229; Statement of Dan Schlosser, Chairman, Meat and Poultry Committee, the Association of Food and Drug Officials of the US, *id.*, at 205; Statement of Shirley Barker, *id.*, at 99; Statement of J. Robert Cameron, Assistant Manager, Department of Health and Hospitals, City and County of Denver, Colo., *id.*, at 93.

bility is placed with the Department of Agriculture,” which he referred to as a “non-health agency.”<sup>27</sup>

In opposition to such groups appeared members of the poultry industry, who testified to a man that authority should lie with USDA. USDA wanted jurisdiction over the new program, and expressed its preference for it.<sup>28</sup> These witnesses argued that Congress should take advantage of the USDA’s experience with compulsory red meat inspection and voluntary poultry inspection.<sup>29</sup> This approach did not strike a chord with the subcommittee, which stated:

In the defense of its marketing-oriented poultry inspection, [USDA] has made contradictory, misleading, inaccurate and exaggerated statements to our subcommittee. This subcommittee cannot have any confidence in the discretion of an agency or officials who make an official presentation of a matter affecting the health, welfare, and lives of citizens in such a loose manner. The Poultry Branch of the AMS has alienated the support of veterinarians, State food and drug officials, farm organizations, labor unions, housewives, and organizations of consumers – all of whom supported compulsory inspection in some other agency – by its conduct of the voluntary poultry inspection program. We have no difficulty understanding why.<sup>30</sup>

Despite the broad base of support enjoyed by S. 3176, the bill was amended such that authority was placed with USDA. This is despite the fact that the subcommittee continued to support FDA jurisdiction over the compulsory poultry program.<sup>31</sup> The reason for this revision is quite remarkable: FDA, through Commission Harvey and the Secretary of the Department of HEW M.B. Folsom, actually declined to accept the larger role. When asked his impression of

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<sup>27</sup>Statement of J. Robert Cameron, Assistant Manager, Department of Health and Hospitals, City and County of Denver, Colo., *id.*, at 93 and 92.

<sup>28</sup>Statement of Earl Butz, Assistant Secretary of Agriculture, *id.*, at 22

<sup>29</sup>*Id.*

<sup>30</sup>S-Rep. No. 129, note 24, at 10-11

<sup>31</sup>*Id.*, at 1

Murray's bill, Harvey stated:

[We like the thrust of the bill]. However, for two important reasons, we believe that this program, instead of being placed in the FDA as proposed by this bill, should be placed in the Department of Agriculture. In the first place, we feel that this is good commonsense. That Department is already charged with administration of the FMIA, which is the only existing mandatory inspection program for meats and meshes with the Federal FDCA. [They can exploit their fifty years of experience. Secondly,] in all candor the FDA is not presently in a good position to develop a poultry inspection service of the magnitude indicated by this bill.... This is not, Mr. Chairman, a case where the FDA is the only organization of the Government that can perform the proposed task.<sup>32</sup>

Later in the same hearing, Harvey elaborated:

If the FDA had enough people to inspect all of this poultry and insure that no bad poultry got into the markets, there would not be any occasion for sitting here, and talking about the type of legislation that we are. However, whether that would be the correct approach to this particular problem is a question.... [B]earing in mind that the poultry industry has sprung up like a mushroom in the last few years...[w]e think that the conditions are analogous to the situation that we had with red meat back in 1906. Because of the public-health problems involved, as well as the other problems of fairness and decency in marketing that are involved, the type of inspection which passes all of the birds under individual scrutiny as contrasted with [FDA's ad hoc, periodic] inspection... [T]he complete inspection is necessary in this commodity. I do not think [the complete inspection] would be done with respect to oranges, or thousands of other foods that I might name.<sup>33</sup>

Harvey's sentiments were echoed by Folsom in his letter to Lister Hill, Chairman of the Committee on Labor and Public Welfare, dated May 9, 1956:

We believe that in view of the fact that the Department of Agriculture is already responsible for the only other mandatory Federal meat inspection program... the poultry inspection program proposed by this bill should likewise be entrusted to that Department. This would make it possible for the Secretary of Agriculture to maintain, as far as practicable, uniform enforcement policy among the different meat products, including poultry. Moreover, in order to carry out the provisions of this bill, a new and separate unit in the FDA would have to be created.... Such a unit would have to be developed from the ground up. It appears inexpedient from the standpoint of the broad public interest for the FDA to undertake the added burden of establishing and maintaining a service of this kind at a time when it is tremendously concerned with the expansion of its staff and facilities for general coverage and adequate enforcement of the

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<sup>32</sup> *Hearing on S. 3176*, note 17, at 11-12

<sup>33</sup> *Id.*, at 20

FDC Act as a whole.... A new poultry inspection service as contemplated in this bill would in our judgment seriously interfere with and overtax the expansion of facilities of the FDA to the detriment of the public generally...<sup>34</sup>

The bill reported favorably by the Committee on Agriculture and Forestry, S. 4243 (which placed authority with USDA) was announced on the house floor and passed over.<sup>35</sup>

Members of Congress apparently took FDA's words to heart; all of the poultry inspection bill introduced after the failure of the Murray bill placed authority with USDA.<sup>36</sup> None were acted upon before the end of the 1956 session.

In the next session of Congress a number of compulsory inspection bills were introduced, each of which placed authority within USDA.<sup>37</sup> The dispute in these hearings centered around whether Congress should mandate that the new program be placed in ARS alongside the red meat inspection program, mandate that the program be developed out of the voluntary poultry inspection program in AMS, or leave the matter to the Secretary's discretion. Many of the witnesses who had testified in 1956 that authority should be placed with the FDA now

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<sup>34</sup> *Id.*, at 7

<sup>35</sup> *Congressional Record*, July 23, 1956, p. 13906

<sup>36</sup> Representative Leonar Sullivan, who introduced a bill which would have amended FMIA to include poultry, stated that there existed proposed legislation "which provided for compulsory poultry inspection by the FDA.... [I]t was my view [however] that it would be better to lodge this assignment with the meat inspection branch of the Department of Agriculture because I knew the FDA is and has been terribly undermanned and is and has been unable to obtain sufficient funds to do the tremendous job we have already placed upon its shoulders. In recent weeks, the FDA has definitely gone on record against being given the powers to administer a compulsory inspection law. The Department of Agriculture, meanwhile, has gone on record as promising effective administration of a compulsory poultry inspection law..." *Hearing on Compulsory Poultry Inspection*, note 16, at 14-15.

<sup>37</sup> H.R. 12, H.R. 5398, H.R. 377, H.R. 514, H.R. 767, H.R. 899, H.R. 1964, H.R. 3052, H.R. 4357, H.R. 5403, H.R. 5463, H.R. Rep. No. 465, 85th Cong., 2d Sess. (1957), *reprinted in* 1957 U.S.C.C.A.N. 1630-1631.

asserted that the poultry program should be housed in ARS.<sup>38</sup> Their justification was basically the same as before, with “ARS” replacing “FDA.” These witnesses felt that ARS had a more legitimate consumer protection orientation, while AMS existed expressly to promote the interests of agricultural producers. Not surprisingly, representatives of the poultry industry favored location of the compulsory inspection program within AMS. They emphasized that poultry was now an industry on par with red meat and should not be “subordinated” to it in ARS.<sup>39</sup> Some were rather dismissive of this justification, as Leonar Sullivan stated that there “has been so much made by some of the industry witnesses here over the necessity for keeping the program under AMS that one begins to think there is perhaps too close a relationship there.”<sup>40</sup> Finally, USDA witnesses favored leaving the matter to the discretion of the Secretary of Agriculture.<sup>41</sup>

The Committee on Agriculture eventually drafted a clean bill, H.

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<sup>38</sup>Letter from D.B. Schlosser, Chairman, Committee on Meat and Poultry Inspection, Association of Food and Drug Officials of the United States to Mr. Watts, Hearing before the Subcommittee on Poultry and Eggs of the Committee on Agriculture, House of Representatives, 85th Congress, 1st Session, on Compulsory Inspection of Poultry and Poultry Products, March 6, 1957, p. 60; Letter from Henry Holle, M.D., member of Public Health-Poultry Industry Liaison Committee to Mr. Watts, *id.*, at 106; Statement of Dr. Oscar Sussman, Association of State Public Health Veterinarians, NJ State Department of Health, *id.*, at 158; Statement of Dr. Aaron Haskin, Health Officer, City of Newark, NJ, *id.*, at 177; Statement of Shirley Barker, Director of the Poultry Department, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, *id.*, at 207; Statement of Dr. Max Hubbard, State Public Health Veterinarian, Virginia State Department of Health, on behalf of Conference of Public Health Veterinarians, *id.*, at 224; Statement of Mrs. James Booras, Assistant Legislative Chairman, Housewives United, *id.*, at 231; Statement of Mrs. Genevieve Oslund, on behalf of Mrs. R.I. C. Prout, President, General Federation of Women’s Clubs, *id.*, at 233.

<sup>39</sup>Statement of Wallace Jerome, Director, Wisconsin Turkey Federation, *id.*, at 55; Statement of John A. Winfield, NC Department of Agriculture, *id.*, at 70; Statement of Cliff Carpenter, President, Institute of American Poultry Industries, *id.*, at 75; Statement of Harold Klahold, President, Northeastern Poultry Producers Council, *id.*, at 91; Statement of Robert R. Parks, Executive Director and Past President, American Poultry and Hatchery Federation, *id.*, at 112; Statement of J.O. Kumpe, Manager of Arkansas Poultry Cooperative, *id.*, at 114-115.

<sup>40</sup>*Id.*, at 270

<sup>41</sup>Statement of Earl Butz, Assistant Secretary of USDA, *id.*, at 10

6814,<sup>42</sup> which the House passed.<sup>43</sup> The Senate passed S. 1747 on April 8, 1957.<sup>44</sup> Although these bill were quite similar, both enacting new legislation placing authority for the new program with USDA, a conference committee was called to resolve the difference.<sup>45</sup> The Senate bill passed in lieu of the House bill,<sup>46</sup> but the compromise bill which emerged from the conference committee was in fact essentially the House version. When the President signed into law the Poultry Products Inspection Act (PPIA)<sup>47</sup> on August 28, 1957, he charged the USDA with the duty to embark on a mandatory inspection program of the poultry industry comparable to that which regulated the red meat industry. According to the Senate report which accompanied the bill the purpose of the bill

is to establish a system of compulsory inspection by the Federal Government of poultry and poultry products in interstate commerce and in major intrastate consuming areas of such size and consequence as to necessarily affect interstate commerce. Such inspection would be rounded out by requirements as to the maintenance of sanitary facilities and practices and as to correct and informative labeling of products.<sup>48</sup>

The PPIA calls for carcass-by-carcass post mortem inspections of all poultry, while the Secretary may direct ante mortem inspection in his discretion.

Thus as of 1957 there prevailed three primary statutes governing food regulation in the United States, namely the FDCA, FMIA, and PPIA, with two regulatory agencies to enforce them, USDA and FDA. So who regulates

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<sup>42</sup>H.R. Rep. No. 465, note 37, at 1630

<sup>43</sup>*Congressional Record*, July 9, 1957, p. 11115.

<sup>44</sup>*Congressional Record*, April 8, 1957, p. 5228.

<sup>45</sup>Conf. Rep. No. 1170, 85th Cong., 2d Sess., (1957), *reprinted in* 1957 U.S.C.C.A.N. 1637

<sup>46</sup>*Congressional Record*, pp. 13478, 15420, and 15544.

<sup>47</sup>21 U.S.C. §§451 *et seq.*

<sup>48</sup>H.R. Rep. No. 465, note 37, at 1630



what? The answer depends on what food product you are interested in and what point in time you are concerned about. Generally speaking, the FMIA and the PPIA confer upon USDA the power to regulate red meat and poultry at the slaughtering and processing plants. As the examples included in the introduction illustrate, however, such a generally statement has little meaning in a modern world where most foods are processed. The question is often more fundamental: what actually constitutes a red meat or a poultry product?

As noted above, looking to see whether a product which contains two percent red meat or poultry is a good rule of thumb for determining whether it is to be regulated as a meat or non-meat product. One complication is that even when a product includes greater than a threshold amount of meat, it will not be considered a meat product if it “is not represented as a poultry [or red meat] product” or “historically [has] not been considered by consumers as products of the poultry [or red meat] industry.”<sup>49</sup>

Beyond these general rules, the inquiry becomes more obscure. To make matters worse, the three Acts make no mention of each other outside a few cryptic references. As a result there exists a gray area

in which a determination of FDA’s authority to regulate red meat or poultry products depends upon an analysis of the extent of FDA’s authority after passage of the Food, Drug, and Cosmetic Act in 1938 and whether a particular action by the Department of Agriculture would occur pursuant to authority granted to USDA before or after 1938.<sup>50</sup>

According to the PPIA, poultry and poultry products are exempt from the FDCA “to the extent of the application or extension thereto of the provisions of

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<sup>49</sup>9 C.F.R. §381.15

<sup>50</sup>“A Case Study of USDA and FDA,” note 2, at 116

this chapter, except that the provisions of this chapter shall not derogate from any authority conferred by the Federal Food, Drug, and Cosmetic Act prior to August 18, 1968.”<sup>51</sup> Similarly, the FMIA contains language to the extent that “notwithstanding any other provisions of law... the provisions of this chapter shall not derogate from any authority conferred by the Federal Food, Drug, and Cosmetic Act prior to December 15, 1967.”<sup>52</sup> To close the triangle, the FDCA provides that “meats and meat food products shall be exempt from the provisions of this chapter to the extent of the application or the extension thereto of the Federal Meat Inspection Act, approved March 4, 1907, as amended.”<sup>53</sup> This mish-mash of self-reference requires that one compare the FDCA with the FMIA in order to resolve exactly what authority over meat FDA received in 1938.<sup>54</sup>

The jurisdictional lines in this gray area can be summed up in this way:<sup>55</sup> any authority granted by Congress to USDA in 1907 remains the exclusive province of USDA. Inspection of slaughterhouses and meat processing facilities represents one such example. The FDCA, by the terms of 21 U.S.C. §392(a), can have no impact on authority already bestowed upon USDA. Any authority granted USDA after 1938 is not exclusive if there is overlapping authority granted to FDA by FDCA. Thus where FDA has received additional authority which does not overlap with authority given USDA under the FMIA in 1907, FDA can proceed under that authority against all food products, includ-

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<sup>51</sup>21 U.S.C. §467f(a)

<sup>52</sup>21 U.S.C. §679

<sup>53</sup>21 U.S.C. §392(a)

<sup>54</sup>“A Case Study of USDA and FDA,” note 2, at 116

<sup>55</sup>See *id.*, at 116

ing meat. Amendments to the FMIA and PPIA, most notably the Wholesome Meat and Poultry Acts of 1967 and 1968, even where they expanded USDA competence into realms formerly occupied by the FDA alone, do not take authority away from the FDA; jurisdiction is concurrent.<sup>56</sup> For example, FDA retains the power to set common or usual names for meat-containing products, given the fact that this authority was granted to USDA after passage of FDCA in 1938.<sup>57</sup>

If this analysis appears confusing today, based on Congressional hearing testimony and debate on the floor of Congress in 1956 and 1957, Members of Congress found the issue no less difficult. Their statements reveal that even at the very birth of PPIA there existed no clear consensus about what exactly was being done with respect to FDA's and USDA's authority. The following exchange between Commissioner Harvey and Senator McNamara illustrates this lack on consensus. In it the Senator attempts to pin Harvey down on the contours of FDA/USDA jurisdiction, something Harvey was not willing (or able) to do. The debate centered around S. 3176, the bill mentioned above which would have amended FDCA to grant jurisdiction over the new poultry program to FDA.

Mr. Harvey: [Regarding current scope of FDA regulation] "Yes [poultry is included]; there is red meat that is included only to the extent that the Meat Inspection Act does not apply, but laws of the type that we have before us proposed here, and like the Meat Inspection Act, deal firmly with the condition and wholesomeness of the food product at the time of inspection. But these products are perishable in nature and in many instances there comes a time

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*, at 133, citing *American Frozen Food Institute v. Mathews*, 413 F.Supp. 548 (D.D.C. 1976), *aff'd sub. nom.*, *American Frozen Food Institute v. Califano*, 555 F.2d 1059 (D.D.C. 1977).

when it is still the FDA's job to deal with it in the channels of commerce and trade when it may have changed its conditions."

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Senator McNamara: [McNamara recited USDA's statement that "processed poultry moving in interstate commerce must meet requirements of the FDCA which is administered by the FDA.... This agency has the responsibility and the authority to prevent adulterated, unwholesome, and misbranded products from reaching the consuming public."] "Do you disagree with that?"

Mr. Harvey: "I do not disagree."

Senator McNamara: "There is nothing in the present legislation then, that would prohibit you from entering into this field, without any new legislation; is that correct?"

Mr. Harvey: "I think, perhaps, Senator, since this proposal here is the stationing of inspectors, and a significant number of inspectors, in each individual plant, and providing inspectors for the inspection of live poultry, that is beyond the comprehension – this provides for an inspection of good birds, bad birds, and all birds. It makes it mandatory that such birds be inspected and marked before they can enter into interstate commerce. That exceeds the provisions of the regulatory authority under the FDCA that is applicable to poultry and to all foods to insure its soundness and wholesomeness, but not with the machinery and the mechanics that are provided here."

Senator McNamara: "Well, then, you do not feel that you are prohibited under the existing legislation from doing this obvious job?"

Mr. Harvey: "Providing plant inspection, you mean?"

Senator McNamara: "Yes, that is right."

Mr. Harvey: "I do not think we are prohibited; no, sir."

Senator McNamara: "If that is the logical conclusion, we need no additional legislation; is that correct?"

Mr. Reidy: "I would feel that since the FDA has not been inspecting plants, and apparently both producer and consumer groups have all agreed that there should be mandatory inspections, Mr. Harvey would like the authority spelled out, and certainly he needs something that would provide the funds and personnel with which to do it, although his position, as I gather from his statement, is that he feels under present circumstances, that the red-meat division of the Department of Agriculture is in a better position to take on the job."<sup>58</sup>

While the issue of whether under FDCA the FDA could have engaged in a system of bird-by-bird post mortem inspection was never resolved, in the 1957 hearings and debates leading up to the passage of the PPIA, it became clear that authority was being taken from FDA and given to USDA. Representative

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<sup>58</sup> *Hearing on S. 3176*, note 17, at 13-20

Hoffman expressed his feeling that PPIA “seems to show a lack of confidence in the FDA because it expressly takes away the jurisdiction of that Department and puts enforcement as well as administration under the jurisdiction of the Secretary of Agriculture.”<sup>59</sup>

The implications of this move, while not discussed at length, did not escape the attention of a few perceptive Congressmen, as the following passage reveals:

Mr. Hoffman: “This bill confers upon the Department of Agriculture some duties which are now given to the Food and Drug Department or agency for the protection of our food, does it not?”

Mr. Watts: “No; I do not think it does. The [FDCA] usually [applies to] the marketing end of the business.... It does not take away from the Pure Food and Drug Department anything that it is now doing. But it does confer upon the Department of Agriculture the authority to inspect the plants. After the product leaves the plant it is up to the Pure Food and Drug Department to supervise the movement of it, and to see that it does not spoil on the way to market and that it is not put on the market in a spoiled or bad condition.”

Mr. Hoffman: “Well, as I understand the Food and Drug Department, does it not have jurisdiction to prevent fraud and to see that we get wholesome food and unadulterated drugs?”

Mr. Watts: “Well, certainly that comes within the purview of it.... But they have a limited number of inspectors.”

Mr. Hoffman: “And one purpose of this bill is to give the Department of Agriculture jurisdiction to see that we get pure food, unspoiled food.”

Mr. Watts: “It gives the Department of Agriculture the right and the duty to furnish inspectors, but it does not destroy the rights of the Pure Food and Drug.”

Mr. Hoffman: “I understand that. But, the bill does direct the Department of Agriculture, does it not, to see that we do not get diseased or unwholesome food, primarily poultry.”

Mr. Watts: “That is right, sir.”

Mr. Hoffman: “But it does not provide for any inspection between the time the retail merchant gets the poultry and the time he sells it, does it?”

Mr. Watts: “It does not provide for any inspection from the time it leaves the processing plant until it is sold to the consumer.”

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Mr. Reece: “I am not complaining about the jurisdiction being transferred from

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<sup>59</sup> *Congressional Record*, July 9, 1957, p.11152

the Pure FDA to the Department of Agriculture, but I do think it does give the Department of Agriculture jurisdiction over matter that not fall within the scope of the Pure FDA.

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Mr. Hoffman: "Well... as was admitted by [Mr. Watts] we do have a FDA charged with the duty of protecting us from... eating spoiled or unwholesome poultry. They have plenty of money and they have an adequate staff of experts. So why confer practically equal authority and impose similar duties on the Department of Agriculture? We hear a great deal of talk of the need for economy.... But here we are again today, as we are so often, enacting new legislation creating new employees to do something that an executive department is already charged with doing. Will we get any better result?... In the end... you have not protected the consumer [because there is no protection once the poultry leaves the processor.]

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Mr. Reece: [Mr. Hoffman] spoke about one very important point for consideration here, that is, the FDA now exercises certain responsibilities to see that the public gets wholesome food, whether it is chicken or something else. When the inspection of poultry is put under the Department of Agriculture and carries the stamp that it is inspected by the Department of Agriculture, the whole tendency of the FDA, I fear, is going to be to withdraw completely from that field. It is admitted here that the Department of Agriculture itself is not going to follow on through to where the poultry is protected all the way to the consuming public."

Mr. Hoffman: "[The bill] is unnecessary because it duplicates the service which the Food and Drug Department is now authorized and equipped to render. It should be defeated."<sup>60</sup>

To summarize then, it is clear from the testimony quoted above that while Congress recognized that PPIA would to some extent take from FDA and give to USDA, the precise boundaries of authority were no more clear in their minds then as they are in ours today. Certain Members anticipated that the structure erected by the PPIA would result in duplication of effort and inefficiency. This leaves one to ask what, in practice, are the problems related to the dual system Congress created, if in fact there are any.

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<sup>60</sup> *Congressional Record*, July 15, 1957, p. 11719-11720

While the missions of USDA and FDA are the same, namely to prevent adulterated and misbranded food from entering the marketplace, there are marked differences in the inspection procedures of FSIS and FDA.<sup>61</sup> FSIS engages in “continuous inspection” at every slaughterhouse and meat processing plant in the United States. These facilities may only operate while an inspector is on duty, and every item must receive FSIS’s stamp of approval.<sup>62</sup> FDA inspectors, on the other hand, visit food processing plants only sporadically.<sup>63</sup> Although they visit “high risk” plants more often,<sup>64</sup> FDA employs no policy approaching continuous inspection or item-by-item scrutiny.

In addition, USDA must grant prior approval of meat processing plant blueprints, while FDA need not even be notified of new food plants.<sup>65</sup> USDA also enjoys a statutory right to examine company records,<sup>66</sup> while FDA can neither inspect nor subpoena such records. This reduces FDA to mere reliance on the good will manufacturers, who often refuse to provide FDA with the documentation it desires.<sup>67</sup>

USDA establishes the labeling requirements for products containing red meat or poultry, while FDA does so for all other food products. Although the statutory provisions are similar,<sup>68</sup> “USDA and FDA have asserted vastly

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<sup>61</sup>These differences are set out in “A Case Study of USDA and FDA,” note 2, at 117-120, 128-133.

<sup>62</sup>21 U.S.C. §455 places the extent of ante mortem inspections to take place within the discretion of the Secretary of Agriculture; the Secretary may also in his discretion dispense with continuous inspection.

<sup>63</sup>See note 16 *supra* and surrounding text.

<sup>64</sup>“A Case Study of USDA and FDA,” note 2, at 119 (note 29).

<sup>65</sup>*Id.*, at 119

<sup>66</sup>21 U.S.C. §460(b)

<sup>67</sup>“A Case Study of USDA and FDA,” note 2, at 119-120

<sup>68</sup>Compare 21 U.S.C. §457(e) of the PPIA with 21 U.S.C. §331 of the FDCA.

different authorities for carrying out this responsibility.”<sup>69</sup> USDA engages in an unwieldy system of premarket screening, while FDA regulations set out the requirements which control the labeling of foods falling under the jurisdiction of FDA. In this context the fact that FDA cannot force information disclosure places another obstacle in its path, hampering its policing of false or misleading labels. To make matters worse, according to one observer, “[d]espite the similarity of their mandates, the obvious inter-relationship of their actions, and the often tenuous jurisdictional lines which divide them, USDA and FDA have failed to develop any coordinated, long-range food labeling policy.”<sup>70</sup>

The resource gap between FDA and USDA is staggering. As of 1993, FSIS operated on a budget of \$600,000,000 and committed 9,000 employees to the inspection of 6,100 meat and poultry processors a year. FDA, on the other hand, received only \$900,000,000 to cover the costs of its regulatory operations, including each of the food, drug, and cosmetic programs. FDA’s staff of 1,000 inspectors is responsible for some 53,000 non-meat food producers, not to mention execution of other FDA duties.<sup>71</sup>

The PPIA has not remained in static form since its enactment in 1957. Eleven years later it was amended by the Wholesome Poultry Products Act (the FMIA was also updated in 1967). The new Act sought to modernize the PPIA and to improve its operation, by stimulating “cooperation with appropriate State agencies with respect to poultry products inspection programs”<sup>72</sup> as

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<sup>69</sup>“A Case Study of USDA and FDA,” note 2, at 129

<sup>70</sup>*Id.*, at 130

<sup>71</sup>These figures appeared in Marian Burros, “Clinton Plan Would Move Meat and Poultry Inspections to FDA” *New York Times*, Sept. 13, 1993.

<sup>72</sup>H.R. Rep. No. 1333, 90th Cong., 2d Sess., (1968), *reprinted in* 1968 U.S.C.C.A.N. 3426



well as by coordinating “the activities of the inspection forces of the Department of Agriculture with those of the personnel from the FDA... for most effective use of their combined resources in protecting the consumer from unwholesome, adulterated, or misbranded poultry.”<sup>73</sup> Congress hoped that with this Act the thirteen percent (some 1.6 billion pounds) of the poultry slaughtered each year in the United States which escaped Federal inspection under the PPIA would now be covered.<sup>74</sup>

The mandatory inspection programs of the USDA fell under the Animal and Plant Health Inspection Service (APHIS), while the voluntary program remained under AMS. When Congress reorganized the USDA in March of 1977, it shifted responsibility for the voluntary inspections services from AMS to the newly-created Commodity Services (CS). CS made up a division within the also-newly-created Food Safety and Quality Services (FSQS). In addition, APHIS lost control of the mandatory meat and poultry inspection program; Congress transferred it to the newly-created Meat and Poultry Inspection division, also within the FSQS. Today APHIS is involved only in the USDA’s regulation of live animals. The Secretary of Agriculture instituted further reorganization on September 30, 1981, when the poultry and red meat programs were moved again. This time they came to rest in the newly-created Food Safety and Inspection Service (FSIS), where they are still housed today, within the Meat and Poultry Inspection division.<sup>75</sup>

We are left then with a dual system which results in inefficiency and

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<sup>73</sup> *Id.*, at 3428

<sup>74</sup> *Id.*, at 3427

<sup>75</sup> 7 C.F.R. §2.53

waste, as well as uncertainty and confusion. The qualities are all the more tragic given that they mar the regulation of food safety, itself critical to the maintenance of our nation's public health. As a critical observer noted, "this bifurcated system demands close communication and cooperation between FDA and USDA field personnel when enforcement action becomes necessary – communication and cooperation that have not always been forthcoming."<sup>76</sup>

The split of authority "results in certain regulatory needs 'falling through the cracks' or in partial enactment where one of the two agencies drags its feet."<sup>77</sup> For example, in 1974, two Georgia natives died from botulism contained in canned stew beef. This product was under the jurisdiction of USDA, which demanded less of the producer than would have the FDA. If FDA regulations had applied to the beef stew, the tragedy may have been averted.<sup>78</sup>

Beyond these structural problems lies a more basic problem of the split in authority between USDA and FDA. Many still question whether USDA has the true interests of the consuming public at heart, doubts first voiced when the PPIA was considered.<sup>79</sup> As stated above, USDA's fundamental mission to promote agribusiness and agricultural interests is seen by many as in conflict with, or even incompatible with, the goals of insuring the public health and protecting the American consumer from harmful food products. This issue is especially germane when comparing the functions of the CS and the FSIS.<sup>80</sup> The Meat and Poultry Inspection division of FSIS and FDA look for unwholesomeness,

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<sup>76</sup>"A Case Study of USDA and FDA," note 2, at 122

<sup>77</sup>*Id.*

<sup>78</sup>This example appears in "A Case Study of USDA and FDA," note 2, at 124.

<sup>79</sup>See *supra* note 28 and surrounding text, and *supra* note 40 and surrounding text.

<sup>80</sup>This comparison is made in "A Case Study of USDA and FDA," note 2, at 125-128.

adulteration, and unsanitary conditions as a proxy for threats to the public health. CS division inspectors only set foot in food plants at the invitation of their owners, for the limited purposes of providing the producer with “USDA grade” labels. These are of value to the producer for marketing reasons; such labels attract customers. Thus the Meat and Poultry Inspection division and the FDA “inspect for health-related characteristics relating to wholesomeness of food products, while CS is concerned primarily with the economic value of the food.”<sup>81</sup> CS is concerned with aesthetics in terms of the role it plays in marketing; FDA and the Meat and Poultry Inspection division concern themselves with aesthetics only to the extent that it indicates unhealthfulness.

Pursuant to an agreement instituted in 1972 and updated in 1975, CS graders report violations to FDA so that it may enforce the FDCA. As a result of this agreement, the CS services became markedly less attractive to producers. In fact, subscription rates dropped off by roughly twenty-five percent following this agreement.<sup>82</sup> More importantly, however, when the agreement was amended in 1975 this sentence was added: “AMS [now CS] inspectors may not act as FDA inspectors but their inspections and consultations with FDA should reduce the necessity for FDA inspections [at plants with voluntary fruits and vegetables inspections].”<sup>83</sup> Given that CS inspection and grading exists for the regulated industry rather than for consumer protection, “to the extent this amendment indicates delegation by FDA of its inspection responsibilities to AMS (CS) inspectors in the form of a presumption that CS plants have been

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<sup>81</sup> *Id.*, at 126

<sup>82</sup> *Id.*, at 127

<sup>83</sup> *Id.*, at 128

adequately inspected for FDA purposes, it is troublesome.”<sup>84</sup>

When President Roosevelt moved FDA out of USDA, he stated that

[t]he work of the FDA is unrelated to the basic function of the Department of Agriculture. There was, however, no other agency to which these functions more appropriately belonged until the Federal Security Agency was created last year. I now believe that the opportunity for the FDA to develop along increasingly constructive lines lies in this new agency.<sup>85</sup>

In an agreement with the FDA, signed on May 29, 1953, Howard Gordon of the Production and Marketing Administration cited USDA’s primary purpose for engaging in poultry inspection as being “to assist producers in preparing better quality products and to provide objective information by means of official certification concerning the grade, quality or condition of a product which will be of maximum assistance to all interested parties engaged in the marketing functions.”<sup>86</sup> Assistant Secretary Butz explained that AMS had control over the voluntary poultry inspection program because “the poultry-inspection work is very closely allied to poultry marketing.”<sup>87</sup> During the hearings on S. 3176, Representative Reidy confronted an official of the USDA on this issue:

Mr. Reidy: “In view of [the FDA inspectors’ competence], why do you feel so strongly that this health operation, to protect the health of the people, should be placed in the Department of Agriculture whose primary function, I assume, is to promote the prosperity of farmers?”

Mr. Butz: “I think there are two answers to that question. First, of course, it is that we have a substantial volume of experience over the last 50 years in red meats, and over a shorter period of time in poultry meats where we now have these 425 inspectors working on the job so that we have the know-how based on this, and we have the contacts with the industry to get the job done. The second reason, I think, is that as I indicated a while ago, we regard this inspection service as having a dual function. One is to protect the health of the population, and the second is to increase consumer acceptance of an important

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<sup>84</sup> *Id.*

<sup>85</sup> S. Rep. No. 129, note 24, at 3

<sup>86</sup> *Id.*

<sup>87</sup> *Hearing on S. 3176*, note 16, at 44

agricultural product through the provision of a guaranty that you are getting a wholesome and healthful product.”<sup>88</sup>

In response to this less-than-convincing statement, Mr. Reidy pointed out that if FDA protected health by safeguarding the integrity of processed foods, consumer acceptance would follow just the same.<sup>89</sup> In his lengthy testimony of Shirley Barker, a representative of the poultry workers’ union, provided a litany of reasons why USDA, and in particular AMS, should not have authority.<sup>90</sup> Barker was also the only witness who responded directly to the argument that USDA’s experience warranted its possession of the poultry inspection program:

Actually meat inspection is still in Agriculture because of a political accident. The FDA was taken from that Department and put in the then-existing Federal Security Agency by a reorganization act in 1940. Congress and the President felt that a conflict of interest existed in Agriculture.... Meat inspection was left in Agriculture as a sop for the Department. However, some health groups feel that any underlying conflict still exists in keeping meat inspection in the Department of Agriculture.<sup>91</sup>

Barker summed up his testimony by focusing on the conflict of interest issue:

Even if poultry inspection were placed in the meat inspection branch of the Bureau of Animal Industries [ARS], the FDA would still have to play a part in assuring the consumer a clean and healthy product. FDA is the only agency which can enforce rules of sanitation and healthfulness after a product leaves the processing plant. Meat inspection’s job is completed when the meat is through processing. Only FDA can seize products contaminated in warehouses, wholesale houses, markets, etc. An example of the difficulties a split of authority brings in the protection of consumers against injurious foods is contained in a recent issue of the American Journal of Public Health. [This refers to a milk contamination episode, which was caused in part by “cumbersome” dual authority.]<sup>92</sup>

These sorts of criticisms did not disappear once the PPIA was enacted. In the years since, numerous proposals have suggested reforming the regulation

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<sup>88</sup> *Id.*, at 32

<sup>89</sup> *Id.*, at 33

<sup>90</sup> See *Id.*, at 111 *et seq*

<sup>91</sup> *Id.*, at 118-119

<sup>92</sup> *Id.*, at 119

of food by removing the responsibility for meat inspection from USDA. One important such proposal occurred in 1972, when Senator Kennedy introduced a bill (S. 3419) which would have created a new Food, Drug, and Consumer Protection agency.<sup>93</sup> The new regulatory body was to be composed essentially of personnel from the FDA, but USDA stood to lose its meat inspection duties under this consolidation plan. When read on the floor of the Senate,<sup>94</sup> the bill still contained this provision, but it was eliminated by amendment of Senator Moss.<sup>95</sup> The watered-down version which eventually emerged from Congress was the Consumer Product Safety Act, which not only did not create a new agency combining the food regulatory authority of FDA and USDA, it actually stripped FDA of some consumer product responsibilities.

The author of the report, “A Case Study of the USDA and FDA,” often cited in this paper, advocated removing the meat inspection functions from USDA: “[w]e believe the bifurcated food regulation system should be unified in a single agency.... Consolidation of food regulation has been recommended by virtually every study of this area in recent years.”<sup>96</sup> Again the issue of USDA’s conflict of interest occupied a central role. In conclusion, the author stated that

There is no rationale, other than an historic one, to justify maintaining two separate, inconsistent and costly systems for inspecting and otherwise regulating production of processed foods. [Transferring USDA’s meat regulation responsibilities to FDA] would eliminate a multitude of conflicts, inconsistencies, and inconveniences – to say nothing of the dual expense of administration – of all these aspects of the food regulation system.

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<sup>93</sup>See S. Rep. No. 835, 92d Cong., 2d Sess. (1972).

<sup>94</sup>*Congressional Record*, July 21, 1972, pp. 21833, 21846

<sup>95</sup>*Id.*, at 21854. Senator Moss explained that “in the interest of passing meaningful product safety legislation in this Congress, I think it is advisable to delete from the bill the section transferring the agricultural functions.”

<sup>96</sup>“A Case Study of USDA and FDA,” note 2, at 139

... Meat inspection [originally] was centered in USDA... largely because the Department's staff included persons [in the Bureau of Chemistry] capable of carrying it out. When Congress made poultry inspection mandatory, that function was placed in USDA principally because poultry inspection was viewed as similar to meat inspection... [T]he meat inspection activities [should be] within the province of an agency whose mission includes the public's health.<sup>97</sup>

Finally, in 1993, as part of his "reinventing government" initiative, Vice President Al Gore issued a report which advocated removing the compulsory meat and poultry inspection programs from USDA and placing them under the authority of FDA.<sup>98</sup> Although lauded by food safety experts and consumer groups, this proposal was met by fierce resistance from certain Members of Congress, as well as from the meat industry and USDA.<sup>99</sup> Having such power foes doomed the proposal; it did not even lead to the introduction of any legislation or to any Congressional hearings on the matter.

To conclude, this study, while not on the scale which a full analysis of this topic demands, is sufficient to illustrate several important issues. First and most importantly, inefficient and wasteful government bureaucracy costs American lives. It cannot be understated that the system which now prevails in the meat regulation field does not maximize protection of our own public health. The frustration would-be reformers have experience reflects a second and related point, namely that governmental regulation has an inertia all of its

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<sup>97</sup>*Id.*, at 139-140

<sup>98</sup>See Marian Burros, "Clinton Plan Would Move Meat and Poultry Inspection to FDA," *New York Times*, Sept. 13, 1993; James Worsham, "Plan calls for FDA to take over meat inspection Shift is part of massive blueprint for overhauling Agriculture Department," *Kansas City Star*, Sept. 8, 1993; Carol Bradley, "USDA bucks proposal to move meat inspection," *Gannett News Service*, Sept. 8, 1993; David Judson, "USDA urged to give up meat inspection role," *Gannett News Service*, Sept. 20, 1993.

<sup>99</sup>See *id.*

own. Often delegation of authority proceeds haphazardly and by historical accident; once established, authority tends to establish roots and become anchored in place. The reason why our system has not been reformed has not been for lack of recognition of its problems, nor has it been for lack of individual effort. The failure of the would-be reforms is instead a testimonial to administrative rivalry and Congressional conservatism (in its non-political sense).

Governmental change often proceeds in responses to crises. Arguably national tragedies were what ultimately produced the PFDA and FMIA in 1906/1907, the FDCA in 1938, and the PPIA in 1957. One hopes that another such event will not have to happen before our current system is updated. But it took the *E. coli* infections in the Pacific Northwest to inspire investigation and critique of USDA's methods of inspecting meat. The episode led directly to proposals such as Al Gore's and in fact gave the impetus necessary to achieve modest reform of USDA procedure. This all occurred after more than a decade of silence on the issue.

Today sentiment that USDA's policy of continuous inspection is outdated and wasteful is gaining sway. If these development persist, along with the increasing recognition that USDA's approach to meat inspection may actually be inadequate to effectively meet the health problems faced today, one wonders if in the not to distant future, perhaps Congress will consider reorganization of the food regulation system. Based on the evidence presented in this paper, I hope it is fairly clear that to effect any meaningful remedy of the current situation,



consolidation of the duties of USDA and FDA is a must. This follows both because of the problems introduced by dual regulatory authority and because of uncertainty over the extent of USDA's commitment to consumer protection.